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Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
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NO. 85-6461

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARLINE MARTIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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It is certainly true that counsel in any cause has an absolute right to express his opinion, provided, of course, it is expressed in a professional manner. On the other hand, counsel has no right to misstate the facts. Yet, that is what precisely has been done by counsel opposite in the State's Brief filed in this cause. For here, apart from the statement made therein that the prosecutor only "implie[d]" in her argument that Petitioner had lied in her evidence (Onp. Brief, p.5), the statement that this Court "recognized in Patterson that the obligation to disprove the existence of self-defense is a burden which the State, ... may properly deem too onerous to undertake ...." (id., p. 8) is one that finds no support at all in Patterson. Another statement, which does not square with the evidence, is that "petitioner did not dispute the existence of ... [the elements of aggravated murder], but rather sought [only] to justify her actions on grounds she acted in self-defense" (ibid). See Ramirez v. Jones, 683 F.2d 712, 716 (2d Cir. 1982) and Mason v. Balkon, 669 F.2d 222, 227 (1983).

Obviously the categorical statement that petitioner conceded she acted "purposely with prior calculation and design" is one that cannot be defended no matter how one looks at it. Indeed, at the risk of possibly gilding the lilly, the State's argument (in which the statement isolated above was used as a major premise) shows the extent to which reliance on artificial premises can push one's reasoning patterns to a level of farfetchedness that reaches Disneyland proportions. For if petitioner actually conceded that her actions amounted to aggravated murder if they were not done in self-defense, then why is petitioner arguing that the lesser offenses of aggravated murder were not properly submitted to the jury?

I

The point emphasized here is that the Ohio Supreme Court, in its resolution of the first issue argued by the State, reached and resolved the merits of our contentions. In it's view the wrongs wilfully visited on petitioner, by arguments the prosecutor had to know were bad, were harmless. This the Ohio Supreme Court oraculated or devined to be so because as they saw it "even absent the prosecutor's statements the jury would have found appellant guilty ... [of aggravated murder]" (State v. Martin, 21 Ohio St. 3, at 95-96). (Also see Appendix to Petition, at pp. A 5-6.) Further, the Record here shows the Ohio Court of Appeals in its review likewise specifically addressed this issue. (Id., at pp. A 9-10.)

II

The State's argument No. II, perhaps even moreso than the various opinions rendered below, gives credibility to our assailment of Ohio's Muscatello Opinions (cited by both the Petitioner and Respondent), which are as wrong as two left shoes. For here, because of these flawed opinions, we have counsel for the State making the argument that (although the jury was improperly told not to even consider any lesser included offense, or offenses) because the jurors reached a verdict on the higher offense it can be assumed with impunity they totally disregarded the improper instructions. Further, we are being told that in these situations

it can likewise be assumed the jurors actually "considered and [specifically] rejected evidence regarding self-defense and the lesser included offenses" (Opp. Brief, p. 6).

The absolute illogic of the State's convoluted positions in this regard proves the extent to which our prosecutor seems quite willing to push even a ridiculous thesis beyond the bounds of commonsense if its adoption would preserve a flawed conviction intact. And, if repudiated would disturb a procedure that has resulted in countless indefensible convictions. In our judgment, there is no way the doctrines here being urged by the State can be squared with the requirements of due process -- its just that simple.

In taking note of the State's argument, the fact of its failure to make any reference to Sandstrom v. Montana, 442 U.S. 510 (1979) and the other cases relied on by petitioner should be credited as being more than the mere indication of a failure to offer a reasoned analysis in support of a position. It should be viewed as an inability to do so.

III

The State's arguments under this segment of its Brief actually distills into a blind, and almost pathetic, adoption of some of the arbitrary positions taken in the majority opinions rendered in the Courts below. Indeed, the State's failure to specifically address any of the arguments made by the petitioner, or even those made by the dissenters on Courts below, was obviously deliberate and for good reason. The ploy is that nothing should be said by the State that might in anyway provide even a slight indication that maybe this Court should review this case.

Indeed, it can only be for this, or some comparably indefensible reason, that the State did what it could to resist the efforts of the "Ohio Public Defender Commission" to participate as Amicus Curiae in this cause. In our judgment, the State's unwillingness to even endorse the participation of the Ohio Public Defender Commission exposes their interest to be that it should win this case rather than to see that justice is done.

And that is really sad, because it cannot be denied that "the duty of a prosecutor is to seek justice," Model Code of Professional Responsibility, E.C. 7-13 (1980).

Still the points made by the Petitioner and by the Public Defender Commission in their Briefs show the very real need why this Court should review this petitioner's cause. Hopefully this Court will resolve the issues raised in this cause.

CONCLUSION

Our condemnation of the Ohio Supreme Court's Opinion, which has been parrotted by Respondent, should be viewed as total. Indeed, the State's argument that Patterson v. New York, 432 U.S. 197 (1977), stands for the proposition that a State can convict one as a murderer when it is just as likely they acted in self-defense is really startling. This is so because if the Court had intended to sanction a rationale so contrary to logic and fairness, as the State's reading of Patterson seems to be, then surely this Court would have said so. Obviously then, since the State of Ohio will continue to misunderstand and distort Patterson, and read its propositions as authorizing them to convict people even when the evidence is in equipoise on the issue of self-defense, the only hope for those who have been victimized, or who could be victimized, thereby lies with this Court.

Hopefully too, the Court will also understand our belief here is that the trial prosecutor's egregious summation was wilfully designed to corrupt the trial and rob it of legitimacy. See National Prosecution Standards, Standard 25.1 (Nat'l. Dist. Atty. Ass'n. 1977). This is so because: If the prosecutor truly had not believed the argument made would be, as it surely was, so very effective, then knowing the argument was improper she obviously would not have taken the calculated risk our reviewing Courts would ultimately declare it to have been harmless. Indeed, the prosecutor's reliance on our Court's past performances is really understandable. Cf., State v. Abboud, 13 Ohio App. 3d 62,

468 N.E. 2d 155, 157 (1983). For it shows that in our county the price our court-pampered prosecutor's have historically had to pay for making some of the most inflammatory arguments ever rendered in any American court room would not outweigh that of a peppercorn. Stated another way, there is nothing in any of Ohio's reported cases, at least insofar as this counsel's research is concerned, which shows anything beyond an occasional reversal that could even possibly provide any real incentives for our prosecutors to control their behavior in front of jurys. Compare United States v. Burse, 531 F.2d 1151 (2d Cir. 1976) and United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). Also see United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981).

Since this Court has effectively shielded offending prosecutors from personal liability for wrongful acts done when "presenting the State's case," Imbler v. Patchman, 424 U.S. 409, at 431 (1976), it seems only right that this Court should at least suggest some stricter approach than the harmless error routine. Hopefully it will be one that is meaningfully consistent with a problem that has really been compounded, which is being rotely used as a panacea by the Courts in Ohio and elsewhere.

For all the reasons argued above and in the Petition this Court hopefully will address the flawed summation made in this case as having been a product of the type of gamesmanship up with which no Court should ever put.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Reply Brief was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 4th day of April, 1986.

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